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IN THE

Supreme Court of the United States

October Term, 1979

No. .....

79-1419

FRED LENN JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, FRED LENN JONES, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 27, 1979.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in Appendix A attached hereto.

No opinion was rendered by the District Court for the Western District of Washington.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 27, 1979.

A timely petition for rehearing *en banc* was filed on January 9, 1980, and was denied by said Court

of Appeals on February 13, 1980. A copy of said Petition is attached hereto as Appendix B; and a copy of said ORDER is attached hereto as Appendix C.

This petition for certiorari is filed within thirty (30) days of the date of entry of the order of said Court of Appeals denying said Petition for Rehearing.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether petitioner was denied a right conferred by the Jencks Act [18 U.S.C. §3500(c)] by reason of the failure of the Court of Appeals to review the twenty-four page verbatim statement of a key government witness, all but a half page of which was suppressed by the trial court over timely defense objections, and placed under seal for appeal, and where such suppression ruling was asserted as error on appeal.

2. Whether disclosure and delivery to the defense of the entire verbatim interview statement of a key prosecution witness was required by the Jencks Act [18 U.S.C. §3500(b)], or alternatively, under *Brady v. Maryland,* 373 U.S. 83 (1963), after petitioner's specific request therefor during trial.

3. Whether certain grand jury testimony of the chief DEA case agent, which was manifestly favorable to the defense, and critical to the issue of the validity of petitioner's arrest, was compellable under *Brady v. Maryland, supra,* at a pre-trial evidentiary hearing on petitioner's Motion to Suppress Evidence for Alleged Fourth Amendment Violations, after a generalized defense request for statements of government witnesses.

4. Whether statements elicited from petitioner by DEA agents following his warrantless detention for several hours, in handcuffs, at the home of a friend, were admissible under *Dunaway v. New York,* ..... U.S. ....., 99 S.Ct. 2248 (1979).

Statutory Provisions Involved.

This case involves Title 18, United States Code, §3500, popularly known as the Jencks Act, which is reprinted in Appendix D, *infra.*

Statement of the Case.

The jurisdiction of the United States District Court for the Western District of Washington was invoked under Title 18 U.S.C. §§3231 and 3232, by virtue of a three count superseding indictment filed in said Court on April 18, 1978,[1] charging 1) that from "sometime in 1974 to September 10, 1978," petitioner conspired to violate Title 21 U.S.C. §841(a) by distributing and possessing with intent to distribute heroin and cocaine within said District in violation of Title 21 U.S.C. §846; 2) that petitioner distributed heroin within said District in violation of Title 21 U.S.C. §§841(a)(1) and (b)(1)(A) and Title 18 U.S.C. §2; and 3) that petitioner knowingly used a telephone to facilitate possession with intent to distribute controlled substances in violation of 21 U.S.C. §843(b) and 18 U.S.C. §2 (C.T. 154).[2]

Petitioner brought a motion in December, 1977, to suppress his post-arrest statements on ground they were

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[1]The original indictment charging petitioner with violation of Count I only, was filed in said Court in September, 1977.

[2]C.T. refers to the Clerk's Transcript on appeal.

elicited in violation of his *Miranda* rights.[3] Evidentiary hearings were held thereon in January, 1978; and said motion was thereafter denied.[4]

An amended motion to suppress evidence on the ground that petitioner's arrest was unlawful was filed in May, 1978; and an evidentiary hearing was held thereon on June 30, 1978 (R. 6/30-39 *et seq.*)[5] A discovery motion which requested, among other things, grand jury testimony and other statements of prospective prosecution witnesses "who can give favorable information" to the defense (C.T. 175), was denied by the trial court (R. 6/30-39; C.T. 198).

Petitioner's said suppression motion was denied on the first day of trial (R. 18).[6] Later, the trial court agreed to reopen the suppression issue if petitioner was convicted (R. 352, 353). However, a post-conviction request for a de novo suppression hearing was denied by the court (C.T. 362), and none was every held.

Trial of petitioner upon the superseding indictment commenced in said District Court before a jury on September 11, 1978.

The evidence may be summarized as follows:

Between 1974 and 1977, JUDY PILLARD, a former heroin addict, distributed heroin and cocaine for WEST-

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[3]*Miranda v. Arizona,* 384 U.S. 436 (1966).

[4]During said evidentiary hearings, an additional ground for suppression of the statements was added, namely, that his arrest was illegal. That ground was not covered by the district court's denial order. (C.T. 86)

[5]The Reporter's Transcript of that proceeding was not physically incorporated into either the Clerk's Transcript or the trial transcript. Hence, it is referred to by the symbols used above.

[6]R. refers to the Reporter's Transcript of the trial and post trial proceedings.

BROOK SANDERS to various persons in the Seattle, Washington area. During that period she claimed to have picked up heroin and cocaine from petitioner in Los Angeles, and brought it to SANDERS in Seattle. On one such occasion, in early May, 1976, she allegedly drove with SANDERS to Los Angeles where they picked up some heroin from petitioner and returned with it to Seattle.

On September 9, 1978, LOUIS ROGERS, working undercover with DEA agents, gave THEODIUS DANIELS $2900 in pre-recorded funds for two ounces of heroin to be supplied later that day.

Late that afternoon, surveilling DEA agents observed WESTBROOK SANDERS arrive at DANIELS' dry cleaning business, and saw DANIELS count out a large roll of bills.

Agents followed SANDERS to his home. Thereafter, DEA agent, RONALD D'ULISSE, procurred a warrant for SANDERS' arrest, and transmitted that information by radio to the agents surveilling SANDERS' house (R. 182).

The agents watched SANDERS leave his house, accompanied by petitioner, enter a car and drive away. A few minutes later, the agents stopped SANDERS' car, placed him under arrest (R. 182), and transported SANDERS and petitioner back to his house (R. 183). The agents had no warrant for petitioner's arrest, and did not know him at that time (R. 183, 188). SANDERS' house was then searched by DEA agents while petitioner was confined in the living room, in handcuffs (R. 274, 281; R. 1/13/78-29).[7] SANDERS

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[7]The citation refers to a transcript of the evidentiary hearing of January 13, 1978, which was not incorporated in the Clerk's or Reporter's Transcript on appeal.

and his mistress, MARY ZUNIGA, were also detained in the same room (R. 282, 635).

During the search, a quantity of narcotics was found in the bathroom of the bedroom occupied by SANDERS and MARY ZUNIGA (R. 211, 216). Pre-recorded funds given to DANIELS by ROGERS was found in SANDERS' purse (R. 226-227).

Petitioner occupied a room down the hall from SANDERS (R. 270), but no narcotics or other contraband was found in petitioner's room, or luggage, or on his person.

After petitioner had been restrained in the living room for about 1½ hours (R. 1/13/78-10, 20) he was taken into a bedroom by DEA agents, strip-searched, given his *MIRANDA* rights, and questioned for another 1½ to 2 hours (R. 293).

Eventually, petitioner told the agents he could lead them to four pounds of narcotics in the Seattle area. However, he told the agents that, because he was unfamiliar with Seattle, he would need the assistance of MARY ZUNIGA to help him find the address where the heroin was (R. 285).

The agents agreed, and petitioner was allowed to talk to ZUNIGA to gain her cooperation. He and ZUNIGA then got into a car and drove off, followed by three car loads of agents (R. 285-286).

ZUNIGA and petitioner drove around for an hour, appearing to look for the location where the heroin was supposedly stashed (R. 286).

MARY ZUNIGA testified, however, that while they were driving thusly, petitioner explained that he had made statements to the agents in order to get an

opportunity to talk to her. According to her testimony, he then gave ZUNIGA some telephone numbers and asked her to call them and tell the person who answered that he was in trouble, to get up to Seattle with some money to get him out of jail, and also that a girl who was coming up there with something would have to be met and be turned around (R. 638, 641-643).

After an hour of driving, the agents became suspicious and pulled along side ZUNIGA's car. Petitioner requested an attorney, and was thereupon taken off to jail (R. 286, 296).

THOMAS BURKE, who spent five years in prison for forgery (R. 724), testified that in 1974, he was a major distributor of narcotics for a Mexican national named CHUEY ARAUJO (R. 708). BURKE claimed that from April to December of 1974, he supplied petitioner with one to two kilos of heroin, two to three times a week, for which Burke received $20,000 per kilo (R. 703-705).

In his testimony, BURKE quoted petitioner as having once said he had to fly to Washington for money; he identified petitioner's grandfather and deceased father, as well as several other persons unrelated to petitioner, as involved in narcotics activity in the Los Angeles area (R. 709-710, 715-716); and he said he met a man identified as one of petitioner's outlets at the home of petitioner's father before the latter's death (R. 741-715).

In November, 1974, Burke went to DEA offices in Los Angeles, California, where he offered his services as an informer to DEA Agent ROBERT LUCIDO (R. 743, 746-747). BURKE was never prosecuted

for his prior narcotic activities (R. 744-745), from which he had earned from $5-10,000 per week (R. 741-742).

On November 13, 1974, BURKE gave a 24 page verbatim statement to Agent LUCIDO in question and answer form (R. 699-700), concerning his alleged narcotics activities, and purporting to identify various persons with whom he had been dealing.

In that statement, BURKE identified petitioner's father as a narcotics dealer, and referred to a JIMMY, whom he identified as a son-in-law of petitioner's father, as having taken over after the death of petitioner's father (R. 751, 759).

BURKE's statement did not mention petitioner by name.

A motion for production of the entire BURKE statement was made and denied (R. 719-720). However, after viewing the statement in camera, the court excised 16 lines which disclosed the above mentioned omission of petitioner's name, and ordered the same read to defense counsel (R. 759). The balance of the statement was ordered sealed and made a part of the appeal record (R. 721; C.T. 339). Thereafter, petitioner moved for suppression of BURKE's testimony on the ground that the denial of his entire statement deprived him of discovery rights under *Brady v. Maryland*, 373 U.S. 83 (1963). That motion was likewise denied (R. 877-878).

On September 20, 1978, the jury found petitioner guilty on all three counts.

On October 4, 1978, petitioner filed a post-conviction motion to set aside the trial court's ruling denying

his motion to suppress, and for a hearing *de novo*, pursuant to a ruling of the court during trial permitting such motion if petitioner was convicted.

Said motion was promoted by the discovery, among a three inch thick mass of Jencks Act material furnished the defense on the first day of trial (R. 108), of the grand jury testimony of the chief DEA case agent, RONALD D'ULISSE.

D'ULISSE told the grand jury that—

> "WESTBROOK SANDERS and FRED LENN JONES were arrested as they were departing the residence at approximately 11:45 on September the 9th in the evening . . . They were placed under arrest." (C.T. 313).[8]

That testimony was critical to petitioner's contention that he had been arrested without a warrant by the same agents who arrested SANDERS, and at the same time and place, and that he had been returned to the house with SANDERS where he was confined in handcuffs (R. 281, 291, 294) until interrogated several hours later (R. 1/13/78-16, 30).

On October 20, 1978, the District Court denied petitioner's motion to reopen the suppression issue, and sentenced petitioner to serve a term of imprison-

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[8]Furthermore, on February 3, 1978, in response to an inquiry of the trial court as to the basis for petitioner's arrest (R. 1/20/78-50; 6/30/78-78), D'ULISSE prepared an affidavit in which he stated:

> "Jones [petitioner] was arrested in the vehicle with Sanders heading in a direction away from the Sanders residence" (R. 73).

When confronted with that affidavit at the June 30 suppression hearing, D'ULISSE stated that he had signed it without reading it. (R. 274-275; R. 6/30/78-74).

ment totaling 15 years, payment of a fine totaling $60,000, and imposing a mandatory parole time totaling 10 years (C.T. 332).

Petitioner filed a timely notice of appeal on October 24, 1978 (C.T. 333).

In his appeal, petitioner asserted that the suppression of the Burke statement by the District Court violated the Jencks Act [18 U.S.C. §3500] and his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963); that the government's failure to disclose or produce the grand jury testimony of Chief DEA case agent RONALD D'ULISSE at or prior to the suppression hearing of June 30, 1978, deprived petitioner of his *Brady* rights; and that the District Court erred in denying petitioner's motion to suppress evidence obtained by virtue of his unlawful arrest.

In his Petition for Rehearing (at App. B 12-14), petitioner noted that the questions of the Court during oral argument implied that the Court was not aware that the Burke statement was a part of the record on appeal, albeit under seal, or that petitioner had never examined said statement because not permitted to do so, and noted further that the Court appeared not to have reviewed the Burke statement, and that its opinion failed to indicate that the Court had done so.

Petitioner is presently serving the prison sentence imposed by the District Court below.

REASONS FOR GRANTING CERTIORARI.

1. The Court of Appeals' Opinion Departs so Far From the Standards of Criminal Justice as to Require the Exercise of This Court's Supervisory Powers.

Section 3500(c) of the Jencks Act (18 U.S.C.) mandates that on appeal, the entire text of a statement excised or suppressed by the trial court be made available to the appellate court—

> ". . . for the purpose of determining the correctness of the ruling of the trial judge."

The Opinion of the Court of Appeals states that the trial judge explicitly ruled that the excised portions of the Burke statement referred to other investigations.

Actually, the trial judge said no such thing; but the point is that the Court of Appeals failed to review either the statement itself or the correctness of the Court's ruling concerning it, as section 3500(c) requires.

In *Palermo v. United States*, 360 U.S. 343 (1959), this court observed that the Jencks Act procedures "are exclusive [and] constitute the rule of law governing the production of" statements of government witnesses made to a government agent.

In camera review of the relevancy of statements of government witnesses was rejected in *Jencks v. United States*, 353 U.S. 657, at pp. 667-668 (1958), as being beyond the prescience of the trial court. While that objection has since been subordinated to Congressional intent, it is no less valid today. Therefore, appellate review of the trial court's ruling upon the producibility of section (e) statements is essential to ensure the fairness intended by the statutory design, and the fundamental confrontation rights of an accused.

2. This Case Raises a Significant and Recurring Question in the Administration of the Jencks Act Concerning the Appropriate Standards for Determining Whether a Verbatim Statement of a Government Witness Is Relevant to the Subject Matter of His Testimony.

Not since *Rosenberg v. United States*[9] and *Killian v. United States*[10] has this Court considered whether a statement of a prosecution witness relates to the subject of his testimony, although the problem appears to be a recurring one (See: *United States v. Umans*, (2d Cir., 1966) 368 F.2d 725, 731, cert. gr., 386 U.S. 940; cert. dism'd, 389 U.S. 80; See dissenting opinion in *Erckman v. United States,* 416 U.S. 909-912 (1974); cf. *United States v. Rivero,* (5th Cir., 1976) 532 F.2d 450, 460).

In *Killian, supra,* this Court did not reach the question after the Solicitor General conceded that some of the documents in question related to the direct testimony of the witness. The Court thereupon remanded the case to the District Court for a determination of whether or not the error was harmless.

In *Rosenberg, supra,* five of six letters written by the victim to the FBI were found to be unrelated to her trial testimony, although neither the content of the letters nor the basis for the ruling is disclosed in the opinion.

A sixth letter, in which the victim admitted 'hat her memory of the events at issue in the trial was faulty, was found relevant to her testimony. The Court concluded, however, that the error of the trial court

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[9]360 U.S. 367 (1959).

[10]368 U.S. 231, 243 (1961).

in suppressing it was harmless because the witness testified to that fact.

In this case, the Court of Appeals concluded, albeit erroneously, that the District Court found the excised material related to other investigations.

That determination, even if true—which it is not—does not meet the Jencks Act test, which turns on the question of whether or not the statement relates to the *subject matter* of the direct testimony of the witness.

Since Burke testified on direct about the scope of his illicit narcotic operation, and referred to several persons involved therein including CHUEY ARAUJO, who is apparently mentioned in his statement (R. 720), it would appear that the entire statement was producible under the Jencks statute.

Furthermore, where the trial Court conceded that one of the twenty-four pages of the statement was clearly impeaching, and hence relevant to the witness's testimony, because of the omission of petitioner's name under circumstances when its disclosure was to be expected (R.. 720), it follows that production of the entire statement is necessary to give the excised portion a syntax.

Thus, the excised statement not only alludes to an earlier, but suppressed reference by the witness to a TROY JONES, a namesake of petitioner's father and of a brother who testified for the defense; but further, it can be—and by the opinion was—construed to make an indirect reference to petitioner.

Direct contradiction between the testimony of a witness and his statement is not, of course, a prerequisite of producibility (*Campbell v. United States*, 373 U.S.

487, n. 13 (1963); *Palermo v. United States,* (1959) 360 U.S. 343, 353, n. 10); nor is it the only *test* of an inconsistency (*Clancy v. United States,* 365 U.S. 312, 316 (1961)).

"Relate" in the Jencks Act sense is not limited to factual narratives. A statement which supports impeachment for bias or interest (*United States v. Borelli,* (2d Cir., 1964) 336 F.2d 376, 393) or faulty memory (*Rosenberg v. United States,* 360 U.S. 367, 370 (1959)) surely relates to the witness's testimony no less than direct conflict between the statement and testimony of the witness.

Under the decisions of this Court, the standard used by the courts below for determining the relevancy of a government witness's statement to the subject matter of his direct trial testimony is unduly constrictive, and tends to impair effective cross-examination and trial preparation.

This Court should therefore reaffirm a broader standard which will effectuate the design of the Jencks statute "to further the fair and just administration of criminal justice" (*Campbell v. United States,* 365 U.S. 85, 92 (1961) (*Campbell* I); *Campbell* II, 373 U.S. 487, 495 (1963)).

3. The Holding of the Court of Appeals That Statements of Government Witnesses Discoverable Under Brady v. Maryland Are Subject to Jencks Act Limitations Presents an Important Question in the Application and Administration of That Statute in Relation to the Brady Doctrine.

In *Goldberg v. United States,* 422 U.S. 1006 (1975), this Court granted certiorari on the limited question of whether a government attorney's notes of a government witness's statements, "if not compellable under the Jencks Act, are compellable under the doctrine of *Brady v. Maryland*" (373 U.S. 83 [1963]).

Because such notes were deemed compellable under the Jencks Act, this Court did not reach the alternative question of whether they were producible under *Brady* (*Goldberg v. United States,* 425 U.S. 94 [1976]).

Yet, the court apparently recognized as important a question which posed potential conflicting legal and policy considerations underlying discovery rights arising under the strictures of a Congressional statute as against those rooted in the due process clause of the Fifth Amendment.

In this case, the Court of Appeals flatly held that "Jencks Act standards control" evidence which qualifies as both Jencks Act and *Brady* material.

Jencks Act statements are not producible until trial, and then, only *if*—and *after*—the witness has testified.

Therefore, if the Court of Appeals is correct, ***Brady*** material is not producible until trial, and not at all if the government chooses not to call the witness even though his statement contains matter or provides leads to evidence which tends to help the accused establish his innocence, or otherwise to benefit the defense.

Brady holds that the suppression of evidence favorable to the accused, and which is material to his guilt or innocence, after a request therefor, violates his right to due process of law.

In *United States v. Agurs,* 427 U.S. 97, 106-107 (1976), material was said to qualify under ***Brady*** if specifically requested, or if "so clearly supportive of a claim of innocence" that it gives the prosecution notice of a duty to produce.

Clearly, the excised page of the Burke statement qualified under *Brady-Agurs* as the trial court instantly recognized (R. 720). But did the suppressed portion similarly qualify?

In *United States v. Augenblick*, 393 U.S. 348 (1969), Mr. Justice Douglas, writing for a unanimous court, acknowledged that the denial of Jencks Act statements in some situations could constitute a violation of a defendant's Sixth Amendment right to have compulsory process to obtain witnesses in his behalf (393 U.S. at p. 356).

The Burke statement referred to persons some or all of whom may well have denied or refuted the claims about them made by the witness on direct examination. Therefore, its disclosure in advance of trial would appear to have been constitutionally mandated.

Burke's statement was particularly important to the June 30 suppression hearing because probable cause for petitioner's arrest rested in substantial part upon D'ULISSE's claim that he had received information from LUCIDO that the son of a dealer had taken over his father's narcotics business—a claim obviously unsupported by the excised portion of Burke's statement.

Thus, this case presents an important, and as yet unresolved question as to the applicability of *Brady* to pre-trial suppression hearings.

4. This Case Presents an Important and Novel Question as to Whether the Principles of Brady v. Maryland and Agurs v. United States Are Applicable to Pretrial Motions to Suppress Evidence Derived From a Fourth Amendment Violation.

Both *Brady* and *Agurs* are couched in language which, if not allegoric, intimates that the material sought qualifies under *Brady* only if directly related to guilt-innocence (although *Brady* was held applicable to the punishment issue).

Does that mean, however, that disclosure of material sought under *Brady* principles may be withheld if it only affects proceedings involving the determination of the admissibility of evidence bearing on the guilt-innocence issue? In other words, is *Brady* applicable to trials only, or does it extend to pretrial proceedings involving the enforcement or exercise of constitutional rights?

In this case, the chief case agent, RONALD D'ULISSE, testified before the Grand Jury that the petitioner was arrested with SANDERS, in the latter's car, and was transported back to SANDERS' house.

Because petitioner's said arrest was without a warrant, and he was unknown to the arresting agents, D'ULISSE's testimony tended to establish petitioner's arrest as unlawful (See: *Dunaway v. New York,* ..... U.S. ....., 99 S. Ct. 2248 (1979); *Brown v. Illinois,* 422 U.S. 590, 602, 605 (1975); *cf. United States v. Di Re,* 332 U.S. 581, 593-594 (1948)); and hence, that petitioner's subsequent incriminating statements were inadmissible.

D'ULISSE's Grand Jury testimony was unknown to the defense at the time of the suppression hearing. Its existence did not become known until the government produced the Grand Jury transcript containing that testimony, along with a welter of other Jencks Act material, on the first day of trial.

Nevertheless, D'ULISSE's Grand Jury testimony concerning the time and place of petitioner's arrest was of such obvious and critical importance that upon being apprised of it, the trial judge agreed to reopen the suppression issue if petitioner was convicted (R. 352-353).

While a suppression motion is not necessarily directed to the guilt-innocence issue, the ruling thereon may well affect the outcome of the trial.

Furthermore, since the exclusionary rule is aimed at deterring lawless law enforcement (*Mapp v. Ohio,* 367 U.S. 643, 660 (1968)) it seems consistent with that policy to make available to the defense a statement of a government law enforcement officer which relates directly to that issue, particularly under a principle which has its own origins in the due process clause of the same Constitution.

5. The Decision of the Court of Appeals Conflicts With the Decisions of This Court in Respect to a Warrantless Detention for Purposes of Questioning by Law Enforcement Authorities.

Four decisions of this Court have held unlawful a warrantless arrest and custodial detention analogous to petitioner's.

In *Henry v. United States,* 361 U.S. 98 (1959), federal agents, investigating a theft of whiskey from an interstate shipment, followed and eventually stopped a car whose occupants, defendant and another man,

the agents had twice observed carry cartons from a residence and place in the car.

The agents removed the cartons from the vehicle and took them and the two men to the agents' offices. Upon learning two hours later that the cartons contained stolen radios, they arrested both men.

That arrest was held unlawful by this Court (with two members of the Court dissenting), because found to have been based on mere suspicion (361 U.S. at p. 100).

In *Davis v. Mississippi,* 394 U.S. 721 (1969), some boys, among them, the defendant, were rounded up by police and brought to the station where each boy was fingerprinted, interrogated, and released.

Later, the defendant was arrested when it was discovered his prints linked him to the crime under investigation. This Court, rejecting the claim that the Fourth Amendment was inapplicable to the investigatory stage, held that defendant's said detention constituted an arrest for which there was no probable cause.

Next came *Brown v. Illinois,* 422 U.S. 590 (1975), where again this Court held unlawful a warrantless arrest and detention "for investigation" at a police station, for two hours, because based on mere suspicion, even though no force or duress was used, and it culminated in a confession.

Finally, last term, with two members dissenting, this Court held unlawful a warrantless arrest in *Dunaway v. New York,* ..... U.S. ....., 99 S. Ct. 2248, in which the defendant, like *Brown,* was "picked up" and brought to the police station for questioning about a robbery. He was not told he was under arrest, although he would not have been allowed to leave had he

tried. After he was given his *Miranda* warnings, the defendant was questioned, and eventually confessed and drew incriminating sketches.

The confession and sketches were found tainted by the illegal arrest and held inadmissible.

The Opinion of the Court of Appeals fails to follow or even mention any of the foregoing decisions, although petitioner's brief and oral argument urged *Henry, Brown* and *Dunaway* as controlling.

The Court of Appeals concluded that the District Court had found the arrest to have occurred in the SANDERS house after the discovery of narcotics in the latter's bathroom.[11] The Court's Opinion further held that, although no narcotics or contraband was found in petitioner's room, there was probable cause for his arrest.

The government claims that petitioner was not arrested with SANDERS, but returned with him to the latter's house voluntarily. There is no disagreement, however, that once at the house, petitioner was detained involuntarily in the living room, in handcuffs, for at least an hour and a half before his alleged formal—but still warrantless—arrest and interrogation began.

That detention, and the principles of law applicable thereto, is not discussed in the Opinion of the Court of Appeals. Such omission on this record gives rise to a conflict with the aforecited decisions which blurs the point at which they now become operative, and creates doubt and confusion in an area of the law which *Brown* and *Dunaway* had left reasonably clear.

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[11]Actually, the District Court made no findings at all, either as to where petitioner's arrest occurred, or the basis therefor.

Also requiring clarification is the question, presented by this record, of whether a warrantless detention at a private residence, rather than at a police station, is a significant variance from *Davis, Brown* and *Dunaway* to remove it from the principles controlling those decisions. The facts in *Henry, supra,* would seem to the contrary; and of course, if interrogation out of a police environment was held to remove confessions or incriminating statements from the protection of the Fourth and Fifth Amendments, surely that exception would shortly become the rule.

Moreover, in explicitly accepting the conclusions of the trial court on the timing of petitioner's arrest, and the existence of probable cause therefor, the decisions of the Courts below reflect application of inappropriate standards of review which can only encourage lack of candor by federal officers to cover up wrongful intrusions on Fourth Amendment rights or to save a prosecution.

Where constitutional rights are involved, this Court will ordinarily—and on this record, should—conduct its own independent examination of the record, even though resulting in a conclusion on the facts contrary to that reached by the trial court (*Jacobellis v. Ohio,* 378 U.S. 184, 189 (1964); *Napue v. Illinois,* 360 U.S. 264, 271 (1959)).

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

HUGH R. MANES,

Counsel for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee, v. Fred Lenn JONES, Defendant-Appellant. No. 78-3390.

Dec. 27, 1979.

Before CARTER*, KILKENNY and SNEED, Circuit Judges.

SNEED, Circuit Judge:

Jones appeals from a three count conviction for (1) conspiracy to distribute heroin and cocaine in violation of 21 U.S.C. §§ 841(a) and 846; (2) distribution of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A); (3) knowingly using a telephone to facilitate possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 843(b). Appellant challenges (1) the trial court's denial of defense counsel's discovery requests and motion for a continuance; (2) the suppression of a portion of a government witness's prior statement; (3) the existence of probable cause for the defendant's arrest; (4) the admissibility of a statement the defendant made to DEA agents following his arrest; (5) the sufficiency of the evidence to sustain the verdict with respect to Count III; and (6) the propriety of the jury instructions given on credibility of witnesses. We reject each challenge and affirm.

Jurisdiction is conferred upon this court by 28 U.S.C. § 1291.

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*Judge Carter concurred in the final disposition of this case prior to his death on November 18, 1979.

I.
THE DENIAL OF DEFENSE MOTIONS FOR DISCOVERY AND MOTION FOR CONTINUANCE

The trial court correctly ruled that the defense had no right to pretrial discovery of information regarding informants and prospective government witnesses under the Federal Rules of Criminal Procedure, the Jencks Act, 18 U.S.C. § 3500, or *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Federal Rules of Criminal Procedure 16(a)(2) and (a)(3) exclude both "statements made by government witnesses or prospective government witnesses, except as provided in 18 U.S.C. § 3500 [Jencks Act]" and grand jury transcripts from the category of evidence the defense is entitled to discover before trial. This limitation has also been extended to prohibit the pretrial disclosure of the identity of government witnesses in the absence of a showing of reasonable necessity by the defense. *United States v. Richter,* 488 F.2d 170 (9th Cir. 1973).

Appellant's reliance on the Jencks Act as a pretrial discovery tool is completely misplaced. Subsection (a) of the Act specifically provides that no statement of a government witness is discoverable until the witness has testified on direct examination.

Brady does not overcome the strictures of the Jencks Act. When the defense seeks evidence which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control. *United States v. Kaplan,* 554 F.2d 577 (3d Cir. 1977); *United States v. Scott,* 524 F.2d 465 (5th Cir. 1975). Moreover, the appellant is not entitled under *Brady* to the information requested. Although *Brady* established a prosecutorial due process

obligation to disclose evidence favorable to the accused, the Supreme Court has held that the government's refusal to reveal the identity of an informant does not violate *Brady. Weatherford v. Bursey,* 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).[1]

Appellant's contention that the trial court's refusal to grant a continuance deprived defense counsel of sufficient time to digest the material received on the morning of trial in violation of his Fifth and Sixth Amendment rights fares no better. We have refused to find a violation of due process or the right to effective assistance of counsel where the government complied with the Jencks Act and defense counsel had time to read the documents prior to cross-examination. *United States v. Washabaugh,* 442 F.2d 1127 (9th Cir. 1971). The record establishes that the government met the requirements of the Jencks Act. This is enough. Moreover, the disposition of a continuance motion is a matter for the trial judge which will be overturned on appeal only when there was an abuse of discretion. *United States v. Hoyos,* 573 F.2d 1111 (9th Cir. 1978); *United States v. Hernandez-Berceda,* 572 F.2d 680 (9th Cir. 1978). There was no abuse in this case.

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[1]The Supreme Court narrowly interpreted *Brady's* due process requirements, stating, "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . .' *Wardius v. Oregon,* 412 U.S. 470, 474, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973)." *Weatherford, supra,* 429 U.S. at p. 559, 97 S.Ct. at p. 846.

II.
THE SUPPRESSION OF A PORTION OF GOVERNMENT WITNESS BURKE'S PRIOR STATEMENT

To understand appellant's contention under this heading, the relevant facts and trial court procedure with respect to the Burke statement should be set forth. The record reveals that subsequent to direct examination of Burke the prosecutor informed the trial judge, in the presence of defense counsel, that he possessed a documented interview of Burke conducted by DEA Agent Lucido on November 13, 1974. The prosecutor reported that during the interview Burke described narcotics distributors in the Los Angeles area and that the statement was devoid of any references to the defendant.

Defense counsel moved to be permitted to read the statement in its entirety. The court denied the motion but ordered production of the statement for *in camera* inspection and excision of unrelated portions. The court also gave defense counsel permission to cross-examine Burke regarding his failure to mention the appellant during the 1974 interview. During a break in this cross-examination, the court asked the government to read an unexcised portion of the statement to defense counsel. As this was done it became apparent that the statement in fact did include an indirect reference to appellant. Defense counsel utilized a verbatim transcript of this segment of Burke's statement during continued cross-examination, and it subsequently was admitted into evidence.

Appellant objects to the trial court's excision of a portion of the Burke statement. This objection is based on the mistaken assumption that the defense

was automatically entitled to production of the entire statement. The Jencks Act, however, only requires disclosure of statements related to the witness's direct testimony, 18 U.S.C. § 3500(b). *In camera* inspection and excision are procedurally sound methods for rendering appropriate material available to the defense. 18 U.S.C. § 3500(c); *Palermo v. United States*, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959). The record in the present case reveals that the trial judge explicitly stated that excised portions of the statement referred to other DEA narcotics investigations.

Appellant's argument that he was entitled to a transcript of the entire interview under *Brady* fares no better. *In camera* inspection and excision is a sound approach to a *Brady* inquiry. *See, Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968), *on remand*, 431 F.2d 70 (5th Cir. 1970). We hold that production of the unexcised portions of the Burke statement prior to the completion of cross-examination satisfied the Jencks Act and *Brady* requirements.

III.
THE LEGALITY OF THE DEFENDANT'S ARREST AND ADMISSIBILITY OF HIS SUBSEQUENT STATEMENT TO DEA AGENTS

Appellant focuses on the timing of his arrest in an attempt to refute the existence of probable cause. It is undisputed that the appellant and Sanders were stopped by DEA agents while driving away from the Sanders' residence subsequent to the issuance of a warrant for Sanders' arrest. Sanders was immediately arrested, handcuffed and ordered into the police vehicle. However, the parties offer conflicting versions of appellant's arrest. The government asserts that appellant

was merely stopped on the road and voluntarily accepted the officers' invitation to accompany them to Sanders' residence. It appears that he was not handcuffed at this time.

Appellant claims that his arrest was completed either when he was detained on the road, or transported to Sanders' apartment, or immediately after Agent D'Ulisse arrived at the Sanders' residence, and no later than when D'Ulisse advised him of his *Miranda* rights and served him with a grand jury subpoena. At none of these times did probable cause exist asserts the appellant.

The government, however, contends that appellant was not arrested until a search of the apartment uncovered an ounce of heroin, half an ounce of cocaine, and a small quantity of diluted heroin in a bathroom adjointing Sanders' bedroom. The narcotics were wrapped in tissue which matched that contained in a living room dispenser. D'Ulisse testified that from this he inferred that a narcotics dilution demonstration had taken place in the living room. No narcotics or contraband were found in the bedroom occupied by appellant.

In addition to the discovery of the narcotics, the government lists the following factors to support the existence of probable cause to arrest at the time the narcotics were discovered: (1) D'Ulisse had received a report from Los Angeles Agent Lucido that a reliable informant stated "Sanders gets his heroin from a black man in California. The negro male took over his father's distribution organization." (2) D'Ulisse had knowledge of telephone toll records indicating repeated communication between appellant and Sanders. (3) Informant Lou Rogers, who was obtaining heroin from Sanders'

coconspirators in cooperation with DEA agents, reported that 20-30 ounces of heroin was due to arrive in Seattle. D'Ulisse testified that the cumulative effect of this information prompted him to arrest appellant when the narcotics were discovered. At that time appellant was reapprised of his *Miranda* rights and strip-searched.

The trial judge accepted the government's version of the facts and concluded that the appellant was arrested at the Sanders' residence with probable cause. This court must defer to the trial court's findings of fact unless clearly erroneous. *United States v. Cortez,* 595 F.2d 505 (9th Cir. 1979). So constrained we conclude that the appellant's arrest was supported by probable cause. The legality of Jones' arrest disposes of appellant's argument that the statement he made following his formal arrest is inadmissible under *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

IV.

THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR USE OF A TELEPHONE TO FACILITATE DISTRIBUTION OF NARCOTICS

Appellant was found guilty of violating 21 U.S.C. § 843(b), which provides: "It shall be unlawful for any person knowingly or intentionally to use any communication facility in commiting or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter." Conceding there is evidence on the record that he instructed Zuniga

to telephone certain Los Angeles numbers in order to intercept a narcotics shipment, appellant asserts his conviction cannot stand because he did not make the phone calls personally. We reject this argument. The statutory language provides a proper basis for holding the appellant in violation of its terms. Instructing another to use the telephone for the proscribed purpose amounts to a "use" by the instructor.

We also reject appellant's contention that proscribed purpose cannot be established because he issued the telephone instructions with the intention of returning a heroin shipment to Los Angeles. We find sufficient evidence on the record that appellant asked Zuniga to make the calls in order to protect his narcotics from government confiscation, and in this manner to facilitate the distribution of heroin. The proscribed purpose was established.

V.

JURY INSTRUCTIONS ON WITNESS CREDIBILITY

The record shows that the trial judge gave cautionary jury instructions regarding the credibility of accomplices, government informants and witnesses with prior felony convictions. Appellant's dissatisfaction with isolated segments of the credibility instructions does not warrant a finding of prejudicial error.

Affirmed.

APPENDIX B.

Petition for Rehearing and Suggestion for Rehearing En Banc.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, vs. Fred Lenn Jones, Appellant. U.S.C.A. No. 78-3390.

TO: HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

FRED LENN JONES, the above named Appellant, herewith petitions this Court for Rehearing in the within cause, and in support thereof, respectfully shows as follows:

I

UNITED STATES v. WASHABAUGH, 9th Cir., 1971, 442 F2d 1127, IS DISTINGUISHABLE BECAUSE, INTER ALIA, DEFENSE COUNSEL HERE DID *NOT* HAVE TIME TO READ AND ASSIMILATE THE MASS OF JENCKS ACT MATERIAL MADE AVAILABLE ON THE FIRST DAY OF TRIAL.

While it is true that the Jencks Act, 18 U.S.C.A. §3500, puts the statements of witnesses beyond the reach of a subpoena, discovery or inspection until the witness has testified, in this case the government *agreed to*—and the Court ordered—production of Jencks Act materials on the first day of trial (R. 6/30/78-p. 26/11-13; 29/5-12; clk. tr. 198/28-30).

A *three* (3) inch volume of Jencks Act material, including statements and grand jury testimony of prosecution witnesses, was provided the defense at noon of the first day of trial (R. 108).

Defense counsel asked the Court for a short continuance to permit him to assimilate the material (R. 2, 108). That motion was denied (R. 2/22-23; 109/12); and trial commenced that very afternoon.

The trial court acknowledged that his ruling put pressure on the defense (R. 249/16-17); yet, as appellant's brief noted (pp. 25-26), the pressure was intensified and perpetuated by the trial court's relentless rush to verdict.

United States v. Washabaugh, 9th Cir., 1971, 442 F2d 1127, in an opinion which does not reveal the number, length or complexity of witness's statements involved, nor any other facts underlying that Court's ruling, nevertheless holds that failure to disclose such material before trial is not error where counsel has time to read them before cross-examination.

Washabaugh is distinguishable because defense counsel in this case did not have time to read and digest the statements before cross-examination. The trial court's refusal to grant even an afternoon's adjournment was surely arbitrary and unfair under the circumstances presented on this record.

II

UNITED STATES v. KAPLAN, 3d Cir., 1977 545 F2d 577 and *UNITED STATES v. SCOTT,* 5th Cir., 1975, DID NOT, AS THE COURT'S OPINION SUGGESTS, HOLD THAT THE JENCKS ACT CONTROLLED THE DISCLOSURE REQUIREMENTS OF *BRADY V. MARYLAND.*

The Court's opinion (p. 2), relying on *United States v. Kaplan,* 3d Cir., 1977, 554 F2d 577, and *United States v. Scott,* 5th Cir., 1975, 524 F2d 465, holds

that *BRADY* evidence is controlled by Jencks Act standards.

At trial, the prosecution and the trial court conceded that the defense was entitled to *Brady* evidence well before trial (R. 6/30/78-p. 32/6-10, 18-21).

Appellant respectfully submits that neither *Kaplan,* supra, nor *Scott,* supra, hold to the contrary.

In *Scott,* supra, the Fifth Circuit held that since impeaching statements of a government witness were available at the time of cross-examination, the right of defense counsel to impeach the witness was *there* fully satisfied, and no *Brady* violation was apparent.

In contrast, defense counsel here was denied effective cross-examination of Agent D'ULISSE at the suppression hearing of June 30 when, despite the defense demand for *Brady* material (R. 6/30/78-p. 32/12-21), the prosecution withheld D'ULISSE's grand jury testimony in which the latter averred that appellant was arrested with WESTBROOK SANDERS—a statement which not only severely discredited D'ULISSE's suppression hearing testimony, but also undermined the government's claim of probable cause for appellant's arrest.

In *Kaplan,* supra, the Third Circuit found no reversible error in presenting exculpatory evidence to defendant at trial, although the court expressed the view that it would have been preferable to have permitted inspection in advance of trial (554 F2d at p. 581).

Even so, the *Kaplan* court noted that a different result might obtain where the record showed delay in disclosure of exculpatory evidence and lack of time for the defense to make needed investigation (554 F2d at p. 580).

In *Kaplan,* however, the trial court gave the defense adequate time to review the exculpatory documents, and the defense did not request additional time (554 F2d at p. 580).

In the case at bar, the time for preparation and investigation following delivery of *Brady* evidence was wholly inadequate, and defense requests for additional time were rejected (R. 2, 108, 109).

III

WEATHERFORD v. BURSEY, 1977, 429 U.S. 545, IS NOT APT.

Weatherford v. Bursey, 1977, 429 U.S. 545, cited in the Court's opinion (p. 3) for the proposition that nondisclosure before trial of a government witness does not violate *Brady v. Maryland,* is not really on point here. In *Weatherford,* the Supreme Court held that non-disclosure of the identity of an undercover agent before he took the stand did not violate the defendant's Sixth Amendment or *Brady* rights.

It is not just the prosecution witness's identity that is at issue here, however, but disclosure of that witness's *statements,* which, in the case of Agent D'ULISSE, were favorable to the defense, and in the case of prosecution witness BURKE, were impeaching.

IV

THE NON-DISCLOSURE OF THE BURKE STATEMENT IN ITS ENTIRETY VIOLATED THE JENCKS ACT.

At oral argument, the Court seemed surprised to learn that, with the exception of the one page read to the jury (R. 759/4-25), defense counsel *had not*

even seen—and was not permitted to see—the 24-page statement of prosecution witness, TOM BURKE, given to Agent LUCIDO *four (4) years before* appellant's trial.

This Court asked whether the entire BURKE statement was part of the record, thereby intimating that the Court had not reviewed the statement.

As noted in appellant's brief (p. 34), and at oral argument, BURKE's 24-page statement was sealed and entered by the clerk as Docket #339, and made a part of the record on appeal (Clk. Tr. 2, 339, 361).

In the brief passage which the defense was permitted to read, the informant, BURKE, alluded to an earlier reference in his statement to appellant's father, TROY JONES (R. 759/23-25) [or possibly his brother of the same name—See R. 814]. The earlier reference was contained in the disclosed passage, and despite its obvious materiality, the defense was not allowed to see it, nor any other portion of the statement.

Later, BURKE testified that TROY JONES was appellant's grandfather, and a "runner" for appellant (R. 776).

Hence, the witness's initial reference to TROY JONES was important for purposes of impeachment or rebuttal.

Of course, there may well have been other portions of the statement which the defense might have used to discredit BURKE's testimony. However, the defense is in no position to determine the extent to which accounts of transactions in the statement conflict with his trial testimony.

Even so, the Jencks Act, 18 U.S.C. §3500(c), expressly provides that—

". . . the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court *for the purposes of determining the correctness of the ruling of the trial judge.*" (Emphasis added.)

Although appellant's brief contended that the non-disclosure of the BURKE statement was error (See: Appellant's Brief, p. 28, 32/9-15; 34/19-22), the *Court's opinion fails to indicate that the Court reviewed the BURKE statement as required by the JENCKS Act,* nor *does the opinion indicate whether there are matters in the BURKE statement which might be of aid to the defense.*

On the other hand, the failure of the government to produce the BURKE statement in its entirety not only violates the mandatory provisions of the JENCKS Act (18 U.S.C. §3500 (b)), but would appear to be reversible error (*United States v. Carrasco,* 9th Cir., 1976, 537 F2d 372; *United States v. Aaron,* 2d Cir., 1972, 457 F2d 865, 869).

V

THE COURT OVERLOOKED THE MAIN THRUST OF APPELLANT'S CONTENTION CONCERNING HIS ARREST, AND THE DECISION OF THE UNITED STATES SUPREME COURT IN *DUNAWAY v. NEW YORK*, 1979, 99 S. Ct. 2248 WHICH CONTROLS THE ISSUE OF PROBABLE CAUSE HERE.

The Court's opinion (p. 6) declares that "this Court must defer to the trial court's findings of fact [on the issue of probable cause] unless clearly erroneous," and concludes that "appellant's arrest was supported by probable cause."

However, the trial court did not make any findings of fact on the issue of probable cause.

At one point, the Court appeared ready to delegate to the prosecution the responsibility for preparing an order incorporating facts "as they appeared at the evidentiary hearing that would support a finding of probable cause" (R. 17/18-23).

But because of the belated disclosure of Agent D'ULISSE's grand jury testimony, the trial court agreed to re-open the suppression issue if the jury verdict was adverse to appellant (R. 18/15-21; 352/9-20).

The trial judge may well have accepted the government's version of the facts as the opinion suggests (at p. 6), but the question persists, which version?

The point, however, is that *Dunaway v. New York,* 1979, ... U.S. ....., 99 S. Ct. 2248, decided only last June, is right on point, and controls the question here. In *Dunaway,* the Court held on closely analogous facts that transporting a person to the police station for custodial interrogation violated the Fourth Amendment.

In the case at bar, appellant was not told he was free to leave (R. 6/30/78-p. 42/23-24). On arriving at SANDERS' house, he was confined to the living room (R. 6/30/78-p. 52/8). Thereafter, he was questioned.

Though SANDERS' house was not a police station, it was used temporarily for custodial purposes.

Therefore, *Dunaway,* supra, applies. While that decision is discussed at length in appellant's brief (pp. 40-42, 51-52), and at oral argument, the Court's opinion fails to mention it at all.

The Court should reconsider the probable cause issue in light of *Dunaway v. New York,* especially since the trial court did not have the benefit of that decision during appellant's trial.

SUGGESTION FOR REHEARING EN BANC

The oral argument on the within case was held on November 14, 1979. Judge OLIVER CARTER, who presided on the panel which heard oral argument, died on November 18, 1979, of a heart attack. It would appear that his untimely death prevented him from participating in the opinion of the Court.

In any event, the matters raised in this Petition should be heard before the entire panel because of their importance and potential influence on future criminal litigation.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully requested that this Petition for Rehearing and Suggestion for Rehearing en banc be granted, and that judgment of the District Court be, upon further consideration, reversed.

DATED: January 8, 1980.

Respectfully submitted,

HUGH R. MANES and
PETER N. PRIAMOS
/s/ By Hugh R. Manes
HUGH R. MANES
Attorneys for Appellant and
Petitioner FRED LENN JONES

APPENDIX C.

Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Fred Lenn Jones, Defendant-Appellant. No. 78-3390.

Filed: Feb. 13, 1980.

Before: KILKENNY and SNEED, Circuit Judges.

The remaining members of the panel in the above case have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D.
Jencks Act, 18 U.S.C. §3500.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such

statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for is use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechancial, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.